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Supreme Court of the United States

No. 210

THE UNITED STATES OF AMERICA, as Owner of the S/S "CHRISTOPHER GALE",

Petitioner,

against

CHRIS NIELSON, et al., Co-partners Trading Under the Firm Name and Style of DAUNTLESS TOWING LINE, as Owner of the Tug "DAUNTLESS No. 6",

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Table of Cases Cited

	PAGE
Bisso v. Inland Waterways Corp., 114 Fed. Supp. 713	4
Dalzell v. The New York, 77 Fed. Supp. 793	2
Mathiasen Towing Co. v. U. S. A., 87 Fed. Supp. 216	2
Moran Towing & Transportation Co., Inc. v. Navigazione Libera Triestina S. A., 2nd Cir., 92 Fed. 2nd 37	2
Santa Fe P. and P. R. Co. v. Grant Bros. Constr. Co., 228 U. S. 177	4
Sun Oil Co. v. Dalzell Towing Co., 287 U. S. 291	2, 4
Syracuse, The, 12 Wall. 167	3
Wash Gray, The, 277 U. S. 66	3

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In petitioner's Question 1 the Government refers to "damage to the tug incurred through *the negligence of the tug owner's own employee* in the course of the towing operation". This begs the question for under the terms of the Pilotage Clause involved in this case, the Government specifically agreed that the pilot "becomes the servant of the owners of the vessel assisted" and that "neither those furnishing the tugs . . . . or their owners . . . . shall be liable for *any damage* resulting therefrom." (Emphasis supplied.)

When the Government itself fixed the rates for towage services with the towboat owners it included the Pilotage Clause in consideration of the lower rates obtained by inclusion of that Clause.

We submit that it is well settled that this form of Pilotage Clause governed relations between the Government as owner of the *Christopher Gale*, the licensed pilot who was on the ship in charge of her maneuvers, and the tugs which were assisting in the docking operations.

See:

Moran Towing & Transportation Co., Inc. v. *Navigazione Libera Triestina S. A.*, 2nd Cir. 92 Fed. 2d 37;
Sun Oil Co. v. *Dalzell Towing Co.*, 287 U. S. 291;
Dalzell v. *The New York*, 77 Fed. Supp. 793;
Mathiasen Towing Co. v. *U. S. A.*, 87 F. Supp. 216.

In the *Mathiasen* case, *supra*, the facts were almost on all fours with those of the instant case, and one of the towing tugs was damaged. Judge KENNEDY points out at page 218:

> "The fallacy underlying respondent's position is that it seeks to apply to a case of liability in rem the principles which would govern personal liability, and *it ignores the effect of the pilotage clause. There was no reservation in the standard pilotage clause in effect at the time of this disaster under which the towage company waived any rights which a third party would have.* And the effect of the pilotage clause is much the same as if, until the completion of the operation, the docking master had been discharged by the tower and had entered the service of the tow." (Emphasis supplied.)

The same clause was under consideration in the case of *Dalzell* v. *The New York*, *supra*. In the course of the Court's opinion at page 795 it was stated:

> "Nor can any fault, of course, be ascribed to the tug *Lloyd Dalzell*. She was under orders from those in command of the Christian Holm (the steamer which was being assisted). The pilotage clause of the towage contract imposed responsibility on the owner of the vessel which was assisted by the tug. That Romano (the pilot who was on the bridge of the ship) was in the general employ of the libellant can-

to have contracted for the docking assistance of the *Christopher Gale* with full knowledge of the legal effect of that clause.

2. The pilotage clause has been held not in violation of public policy.

The petitioner seeks to avoid its agreement as to the employment of the pilot by arguing that the "pilotage clause" is against public policy. It seeks to avoid the Supreme Court's decision on this point (in *Sun Oil Co. v. Dalzell*, 287 U. S. 291) by attempting to make a distinction between pilotage (as distinguished from a tug assisting operation) of the vessel from one point to another. It should be noted that in the *Sun* case "respondent sent tugs to take her through waters leading to New York Bay and to a dock at Bergen Point, New Jersey" (p. 293). The Court then said at bottom of page 293, "Her master, officers and crew were at their stations, and her propelling power and steering apparatus were used to bring her to *destination*. And if the pilotage clause is valid, the tug captains *while on board* the tanker and respectively acting as her *pilot* were for that time the servants of petitioner (the ship owner) and the respondent may not be held responsible for any act or omission of theirs during the period of that service." (Emphasis supplied.)

Thus it is clear that in the *Sun* case there was no such distinction made by the Supreme Court as the petitioner contends but the court gave a broad application of the obvious meaning of the agreement whereby the ship owner obtained the services of the pilot. The Court further on page 294 specifically held that the "pilotage clause" did not violate public policy, quoting from *Santa Fe P. and P. R. Co. v. Grant Bros. Constr. Co.*, 228 U. S. 177, 178:

> "There is no rule of public policy which denies effect to their expressed intention, but on the con-

not relieve the impleaded respondent of liability" (citing cases).

We submit that the cases cited by the petitioner at pages 5, 6, 7 and 8 of its brief show no reason to grant certiorari but rather a situation where the law is uniformly well settled. Petitioner argues that the decision in *The Syracuse*, 12 Wall. 167 "invalidated any attempt by a towing vessel *to contract against its own negligence.*" (Emphasis supplied.) The instant case is not one of a tug contracting against its own negligence, but of a tug owner contracting against a pilot's negligence. The record is devoid of any proof of tug's negligence, hence Government is asking certiorari on an issue and factual situation not involved in the case.

It also cites as authority for its contentions *The Wash Gray*, 277 U. S. 66, which is a case of an insured suing its underwriters. There the real points at issue were the questions of the seaworthiness of the vessel, and whether the *Wash Gray* sank from a peril of the sea covered by her insurance.

In Question 2 the petitioner argues that the Pilotage Clause is opposed to public policy and hence invalid.

Petitioner seeks to avoid its agreement as to the employment of the pilot by arguing that the "pilotage clause" is against public policy. It seeks to avoid the Supreme Court's decision on this point (in *Sun Oil Co.* v. *Dalzell*, 287 U. S. 291) by attempting to make a distinction between "pilotage (as distinguished from a tug assisting operation) of the vessel from one point to another". It should be noted that in the *Sun* case "respondent sent tugs to take her through waters leading to Newark Bay and to a dock at Bergen Point, New Jersey" (p. 292). The court then said at bottom of page 293, "Her master, officers and crew were at their stations, and her propelling power and steering apparatus were used to bring her to *destination*. And

> trary as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made."

In *Bisso* v. *Inland Waterways Corp.*, 114 Fed. Supp. 713, the Court in discussing the *Sun Oil Co.* v. *Dalzell, supra,* said at page 715:

> "In so deciding the Supreme Court said that the validity of the clause could not be reasonably doubted, that no rule of public policy makes invalid a release clause even as to negligence, and that the highest public policy is found in the enforcement of the contract as it was written."

Further at page 715 the Court wrote:

> "Therefore since the contract of towage is not so affected with a public interest as to make a release from liability clause against public policy and since the highest public policy is found in the enforcement of a contract as it is written, there would seem to be no reason why such clause should not be valid and enforcible even as to the negligence of the tug, provided the agreement of the parties on this point is clear and unequivocal."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

ANTHONY V. LYNCH, JR.,
Proctor for Respondent.

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January, 1955.

if the pilotage clause is valid, the tug captains *while on board* the tanker and respectively acting as her *pilot* were for that time the servants of petitioner (the ship owner) and the respondent may not be held responsible for any act or omission of theirs during the period of that service." (Emphasis supplied.)

Thus it is clear that in the *Sun* case there was no such distinction made by the Supreme Court as the petitioner contends but the court gave a broad application of the obvious meaning of the agreement whereby the shipowner obtained the services of the pilot. The court further on page 294 specifically held that the "pilotage clause" did not violate public policy, quoting from *Santa Fe P. and P. R. Co.* v. *Grant Bros. Constr. Co.*, 228 U. S. 177, 178:

> "There is no rule of public policy which denies effect to their expressed intention, but on the contrary as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made."

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> and enforcible even as to the negligence of the tug, provided the agreement of the parties on this point is clear and unequivocal."

It is respectfully submitted that the petition for certiorari should be denied.

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